

Updates: Criminal Procedure Monograph 2—Issuance of Search Warrants (Third Edition)

Part A—Commentary

2.13 The Exclusionary Rule and Good Faith Exception

Insert the following case summary before the February 2006 update to page 29:

An affidavit in support of a search warrant that “references facts supporting a finding that a place over which defendant has control would contain evidence of a crime” but that fails to connect the defendant to the place to be searched “does not allow a reasonably cautious person to conclude that evidence of a crime is in the stated place.” *People v Osantowski*, ___ Mich App ___ (2007). However, the omission of that information does not necessarily require the exclusion of evidence obtained as the result of a search executed on the basis of the invalid warrant.

In *Osantowski*, the defendant, whose last name was the same as his father’s, resided in a house belonging to his father. The affidavit in support of the warrant clearly identified the location and residence to be searched and noted that the vehicle parked in the driveway was registered to the defendant’s father. Nowhere in the affidavit was there information indicating that the defendant lived at the residence or had any other connection with the residence described in the affidavit. Because the officers involved were aware that the defendant and his father lived at the residence (during the morning on which the search took place, both the defendant and his father were arraigned on unrelated charges), the Court concluded that

“the affidavit’s failure in this instance [was] merely a good-faith oversight and not the product of police misconduct. Accordingly, the stated purpose of the exclusionary rule, to deter police misconduct, would not be served by applying the rule on the basis of the affidavit’s identified deficiency.” *Id.* at ____.

Part A—Commentary

2.14 Other Exceptions Applicable to Search Warrants

F. Consent

Insert the following case summary after the April 2006 update to page 34:

**Miranda v Arizona*, 384 US 436 (1966).

When a defendant is arrested and a cotenant consents to an officer's entry into the home the cotenant shares with the defendant, the defendant's invocation of his right to counsel and his right to remain silent does not constitute an objection to the officer's entry for purposes of suppressing incriminating evidence against the defendant observed by the officer while in the home. *People v Lapworth*, 273 Mich App 424 (2006). In *Lapworth*, a cotenant consented to an officer's request to enter the home the cotenant shared with the defendant in order to use the telephone. While using the telephone, the officer observed a pair of shoes with a tread pattern similar to the pattern found at the scene of the crime for which he had placed the defendant under arrest. The officer did not seize the shoes. The defendant refused the officer's request to take the shoes and told the officer to get a search warrant. The defendant argued that the shoe evidence was inadmissible against him because it was obtained in violation of his right against unreasonable searches and seizures. According to the defendant, "his invocation of his rights following the *Miranda** warnings constituted a tacit objection and negated the consent given by his roommate." *Id.* at 428.

Said the Court:

**Georgia v Randolph*, 547 US 103 (2006). See the April 2006 update to page 34.

"We disagree. First, we think it a rather long stretch to classify either the invocation of the right to remain silent or the right to counsel following *Miranda* warnings as even a tacit objection to consent to search. Second, the Supreme Court made it clear that 'a physically present inhabitant's *express* refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant.' Accordingly, even if we were to regard an invocation of rights following *Miranda* warnings as a tacit objection to consent to search, a tacit objection is insufficient under *Randolph*."* *Lapworth, supra* at 428.

The Court further noted that although the defendant was under arrest and was seated in the patrol car at the time the cotenant consented to the officer's entry, "[there was no indication that] the police intentionally removed the [defendant] for the express purpose of preventing the [defendant] from having an opportunity to object." *Id.* at 429; *Randolph, supra* at ____.

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2.9 Affidavits Based upon Hearsay Information

A. Informant Must Speak with Personal Knowledge

Replace the May 2006 update to page 20 with the following text:

It is unnecessary to determine for purposes of MCL 780.653 whether an anonymous informant had personal knowledge of the information contained in the affidavit on which a search warrant is based when the affidavit contains additional information sufficient in itself to support a finding of probable cause. *People v Keller*, 479 Mich 467, 477 (2007).^{*} In *Keller*, the information contained in the affidavit supported the magistrate’s conclusion that it was fairly probable that contraband would be found in the defendants’ home because the affidavit was based in part on the small amount of marijuana discovered in the defendants’ trash. *Id.* Although the evidence discovered in the defendants’ trash did not support the anonymous informant’s allegation that the defendants were engaged in drug trafficking, the evidence from the defendants’ trash adequately established the probable cause necessary to justify a search of the defendants’ home for additional contraband. *Id.* at 483. According to the Court, “Because this officer uncovered direct evidence of illegal activity, the marijuana, it was unnecessary to delve into the veracity of the source.” *Id.* at 477.

^{*}Reversing
People v Keller,
270 Mich App
446 (2006).

Part A—Commentary

2.9 Affidavits Based upon Hearsay Information

B. Informant Must Be Credible or Information Must Be Reliable

Replace the May 2006 update to page 21 with the following text:

*Reversing
People v Keller,
270 Mich App
446 (2006).

When, in addition to information obtained from an anonymous informant, an affidavit in support of a search warrant is based on other information sufficient in itself to justify the magistrate's finding of probable cause, it is not necessary for purposes of MCL 780.653 to determine whether the informant was credible or whether the information provided was reliable. *People v Keller*, 479 Mich 467, 477 (2007). In *Keller*, the small amount of marijuana discovered in the defendants' trash was itself sufficient to support the conclusion that there was a fair probability that evidence of illegal activity would be found in the defendants' home. *Id.* Therefore, even though the anonymous tip prompted the initial investigation into the defendants' possible illegal activity, the marijuana alone supports the probable cause necessary to issue a search warrant and "the statutory requirement that an anonymous tip bear indicia of reliability does not come into play." *Id.* at 483.

Part A—Commentary

2.13 The Exclusionary Rule and Good Faith Exception

In *People v Keller*, 479 Mich 467 (2007),* the Michigan Supreme Court concluded that the affidavit and accompanying warrant at issue in the case were not unconstitutional; consequently, the exclusionary rule and good faith exception did not apply. Therefore, delete the May 2006 update to page 29.

*Reversing
People v Keller,
270 Mich App
446 (2006).